Supreme Court, U.S.
FILED

96 2023 JUN 23 1997

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

EILEEN O'HARA,

Petitioner,

vs.

BAYLINER; BAYLINER MARINE CORPORATION d/b/a BAYLINER; BAYLINER MARINE CORPORATION; U.S. MARINE; U.S. MARINE CORPORATION d/b/a U.S. MARINE; U.S. MARINE CORPORATION; PERKO, INC.; PERKO MANUFACTURING CORP.; PERKINS MARINE LAMP & HARDWARE CORP.; BRUNSWICK MARINE COMPANY, FRANK TABONE; THOMAS TABONE; GUDZIKS MARINE, INC.,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. DEVEREAUX
Counsel of Record
Attorney for Petitioner
200 Rector Place, Suite 12D
New York, New York 10280
(212) 783-9466

71372 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

47 pp

QUESTIONS PRESENTED

Whether the federal maritime law preemption of state law remedies in slip and fall personal injury cases occurring on an anchored, engine-off waterski boat engaged in aquatic non-commercial recreational activity in shallow navigable waters fifteen feet from the beach extends the reach of federal maritime law beyond *Executive Jet* and creates a bright line strict locality rule in conflict with the Supreme Court's repeated rejection of such a bright line test?

Whether the federal maritime law limitations period of 46 U.S.C. § 763(a), applies to every tort involving a vessel on navigable waters, including anchored, engine-off, aquatic non-commercial recreational slip and fall boat cases and, if so, does it oust the applicable State's statute of limitations and the State's applicable infancy tolling provisions?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no known parent or subsidiary company of any party to be listed; however, if necessary, the respondents pursuant to Rule 29.6 shall submit a list.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ	6
I. The Federal Maritime Law Preemption Of State Law Remedies In Slip And Fall Personal Injury Cases Occurring On An Anchored, Engine-Off Waterski Boat Engaged In Aquatic Non-Commercial Recreational Activity In Shallow Navigable Waters Fifteen Feet From The Beach Extends The Reach Of Federal Maritime Law Beyond *Executive Jet* And Creates A Bright Line Strict Locality Rule In Conflict With The Supreme Court's Repeated Rejection Of Such A Bright Line Test.	7

Contents

Page

A. The Absence Of A Potential To Disrupt Commerce And Of A Substantial Relationship To Traditional Maritime Activity. 11

II. The Application Of The Federal Maritime Law Limitations Period Of 46 U.S.C. § 763a To An Anchored, Engine-Off Aquatic Non-Commercial Recreational Boat Slip And Fall Case Is A Case Of First Impression Without Precedent. 13

Conclusion 17

TABLE OF CITATIONS

Cases Cited:

Alvez v. American Export Lines, 46 N.Y.S. 2d 634, 415 N.Y.S. 2d 979 (1979), *aff'd*, 446 U.S. 274 (1980) 10, 15

Allen v. Minnstar, Inc., 8 F.3d 1470 (10th Cir. 1993) 8

American Dredging Co. v. Miller, 114 S. Ct. 981 (1994) 10, 14

Atlantic Mut. v. Balfour MaClaine Intern., 968 F.2d 196 (2d Cir. 1992) 11

Contents

Page

Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623 (1st Cir. 1994) 10, 11, 16

Berman Enterprises, Inc. v. Jorling, 793 F. Supp. 408 (E.D.N.Y. 1992) 14

Butler v. American Traveler Co., 887 F.2d 20 (1st Cir. 1989) 10

Calhoun v. Yamaha Motor Corp., 40 F.3d at 622 (3d Cir. 1994), *aff'd, Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619 (1996) 10, 15, 16

Delta County Ventures Inc. v. Magana, 986 F.2d 1260 (9th Cir. 1992) 6, 7, 13

Elliot v. Brunswick Corp., 903 F.2d 1505 (11th Cir. 1990), *cert. denied*, 498 U.S. 1048 (1991) 8

Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972) ..... i, 6, 7, 11, 13, 14

Foremost Ins. Co. v. Richardson, 457 U.S. 668 (1982) 8, 12

Foster v. Peddicord, 826 F.2d 1370 (4th Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988) 6, 7, 9, 13

H2O Houseboats Vacations, Inc. v. Hernandez, 103 F.3d 914 (9th Cir. 1996) 8, 12

Contents

Page

Haggerty v. Moran Towing and Transport Co., 162 A.D. 2d 191, 556 N.Y.S. 2d 316 (1st Dep't 1990) 10

Hutt v. Gibson Fiber Glass Products, Inc., 914 F.2d 790 (6th Cir. 1990) 8

In re Cassaretakis, 284 N.Y. at 128, 44 N.E. 2d 396 . 16

In re DFDS Seaways (Bahamas) Ltd., 684 F. Supp. 1160 (S.D.N.Y. 1987) 16

In re Ludwig Mowinckels Rederi, 25 N.Y. 2d 576, 307 N.Y.S. 2d 660 (1970) 10

In re Nolty J. Theriot, 841 F. Supp. 209 (S.D. Texas 1994) 11

Jerome B. Grubart, Inc. v. Great Lakes Bridge & Dock Company, 513 U.S. 527, 115 S. Ct. 1043 (1995) 6, 7, 8, 11, 12, 13

Kossick v. United Fruit Co., 365 U.S. (1961) 15

Madderns v. Fox Film Corp., 205 A.D. 791, 200 N.Y.S. 344 (3d Dep't 1923), *aff'd*, 237 N.Y. 614 (1924) 7, 8, 9, 13

Martell v. Boardwalk Enterprises, Inc., 748 F.2d 740 (2d Cir. 1984) 8

Matter of Bird, 794 F. Supp. 575 (D.S.C. 1992) 11

Contents

	Page
McGuire v. City of New York, 192 F. Supp. 866 (S.D.N.Y. 1961)	7
Mink v. Genmar Indus. Inc., 29 F.3d 1547 (11th Cir. 1994)	10
Montgomery v. Harrold, 473 F. Supp. 61 (E.D. Mich. 1979)	12
Moore v. Brunswick Bowling & Billiards Corp., 889 S.W. 2d 246, *cert. denied, Vivian Indus. Plastics, Inc. v. Moore*, 115 S. Ct. 664 (1994)	8
Moragne v. States Mar. Lines, 398 U.S. 375 (1970)	15, 16
Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986)	16
Parker v. Motor Boat Sales, 314 U.S. 244 (1941)	10, 15, 16
Petro v. Jad Yacht Charter, Ltd., 854 F. Supp. 698 (D. Hawaii 1994)	11
Pree v. Brunswick Corp., 983 F.2d 863 (8th Cir. 1993)	8
Seymour v. Brunswick Corporation, 655 So. 2d 892 (Miss. 1995)	8
Sisson v. Ruby, 497 U.S. 358 (1990)	6, 12

Contents

Page

Smith v. Knowles, 642 F. Supp. 1137 (D. Md. 1986) 7, 8, 9, 12

Standard Marine Service, Inc. v. Jorling, 214 A.D. 2d 424, 625 N.Y.S. 2d 186 (1st Dept. 1995) 14

Stanley v. Bertram-Trojan, Inc., 855 F. Supp. 657 (S.D.N.Y. 1994) 6, 8, 13, 14

Stuto v. Coastal Dry Dock and Repair Corp., 153 A.D. 2d 937, 545 N.Y.S. 2d 743 (2d Dept. 1989) 16

Wahlstrom v. Kawaski Heavy Indus. Ltd., 4 F.3d 1089 (2d Cir. 1992) 10

White v. United States, 53 F.3d 43 (4th Cir. 1995) ... 9

Woltering v. Outboard Marine Corp., 615 N.E. 2d 86 (Ill. App. Ct. 1993), *cert. denied, Outboard Marine Corp. v. Woltering*, 115 S. Ct. 1270 (1995) 8

Statutes Cited:

28 U.S.C. § 1257(a) 1

28 U.S.C. § 1332 4

28 U.S.C. § 1333 ..... 1, 4

28 U.S.C. § 1441, *et seq.* 4

46 U.S.C. § 763(a) ..... i, 2, 4, 13, 14, 15, 16

Contents

Page

CPLR § 208 .....3, 13, 14, 16

CPLR § 214 .....13, 14, 16

CPLR § 214(5) 3

Admiralty And Maritime Law § 3.5 (2d ed. 1994) 8, 12

United States Constitution Cited:

U.S. Const. art. III, § 2 1

Other Authority Cited:

H.R. Rep. No. 737, 96th Cong., 2d Sess. 1-2, reprinted in 1980 U.S. Cong. & Admin. News 3303 13

APPENDIX

Appendix A — Opinion of the Court of Appeals of New York Dated March 25, 1997 ..... 1a

Appendix B — Opinion of the Supreme Court of New York for the Appellate Division, First Department Dated February 29, 1996 ..... 12a

Appendix C — Order of the Supreme Court of the State of New York for the County of New York, IAS Part 17 Filed May 3, 1995 ..... 15a

Petitioner, Eileen O'Hara, respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York.

OPINIONS BELOW

The opinion of the Court of Appeals of New York is as yet unpublished and is reproduced in the Appendix filed herewith at 1a. The opinion of the Supreme Court of New York for the Appellate Division, First Department is reported at 224 A.D. 2d 353, 638 N.Y.S. 2d 311 and is reproduced at 12a. The order of the Supreme Court of the State of New York for the County of New York is unreported and reproduced at 15a.

STATEMENT OF JURISDICTION

The Court of Appeals of New York entered its judgment on March 25, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Admiralty Clause of the United States Constitution, U.S. Const. art. III, § 2, states in pertinent part:

> The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction.

28 U.S.C. § 1333:

> § 1333. Admiralty, maritime and prize cases
>
> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

> (1) Any civil case of admiralty or maritime jurisdiction, savings to suitors in all cases all other remedies to which they are otherwise entitled.

46 U.S.C. § 763a:

> § 763a. Limitations
>
> Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued.

STATEMENT OF THE CASE

On August 12, 1990, the petitioner Eileen O'Hara, 16 years old, was a guest on a friend's waterski boat that was anchored, engine-off, in shallow water about three feet deep and fifteen feet from the beach. As her friends jumped off the boat, Ms. O'Hara slipped, fell and her leg became deeply impaled on a cleat which tore through her leg as she fell into the water. The cleat was not recessed, sharp rather than blunt edged and not placed differently as was the state of the art on recreational waterski boats. Such boats, unlike maritime commerce ships and other vessels, also typically utilized handlebars and non-skid surfaces.

The boat, owned by Mr. Frank Tabone and entrusted to his son, Mr. Thomas Tabone, was manufactured by the respondents Bayliner; Bayliner Marine Corporation d/b/a Bayliner; Bayliner Marine Corporation; U.S. Marine; U.S. Marine Corporation d/b/a U.S. Marine; U.S. Marine Corporation; Brunswick Marine

Company (collectively "Bayliner"). Bayliner is a Delaware corporation with its principal office in the State of Washington. The Bayliner boat was assembled and sold by Gudziks Marine, Inc., a New York company. The manufacturer and distributer of the cleat used on the boat were the respondents Perko, Inc., Perko Manufacturing Corp., and Perkins Marine Lamp & Hardware Corp. (collectively "Perko"), a Florida corporation.

On August 6, 1993, the summons and complaint was filed. On October 22, 1993, Bayliner was personally served and also served were the Tabones and Gudziks. The Tabones and Gudziks answered without raising jurisdictional and/or statute of limitations defenses. After Bayliner failed to appear and to respond to discovery notices, a default judgment was sought against Bayliner.

Bayliner opposed the motion for default and cross-moved to dismiss on the grounds that the proofs of service had been untimely filed and that the action was time-barred by the State's applicable three year statute of limitations of § 214(5) of the Civil Practice Law and Rules of the State of New York ("CPLR"). Ms. O'Hara opposed on the grounds that there was a tolling of the applicable statute of limitations due to her age of 16 at the time of the accident and, therefore, that the applicable statute of limitations had not run until November 21, 1994.

By Order, filed November 14, 1994, the Supreme Court of the State of New York of the County of New York, granted Bayliner's cross-motion but held that the State's infancy toll, CPLR § 208, applied to toll CPLR § 214(5) with respect to the action against Bayliner. Accordingly, the action was not time barred. Bayliner entered judgment on the Order.

To name Perko as a defendant and to ensure that jurisdiction had been obtained over Bayliner, a second summons and

complaint was filed and also served on Bayliner on August 16, 1994. Perko was also served. Bayliner thereafter conceded that it had been served with process and jurisdiction over it thus obtained. The second pleading alleged the same causes of action based solely on common-law tort theories of recovery as had the previous pleading filed one year earlier. Again, no federal statute, federal maritime law or admiralty jurisdiction was pled.

After the parties were notified that the actions were to be consolidated, Bayliner and Perko served a notice of removal pursuant to 28 U.S.C. § 1441, *et seq.*, to the United States District Court for the Southern District of New York (16a). Bayliner's removal notice asserted that the action was properly removed to federal court because it came within the court's admiralty and diversity jurisdiction pursuant to 28 U.S.C. §§ 1332 and 1333 (16a).

A motion to amend and remand was filed, arguing, among other things, that there was no federal jurisdiction, that federal maritime law did not apply and that judicial economy and fundamental fairness required leave to amend to add the three New York resident defendants, the Tabones and Gudziks, and then to remand the action back to the State court (16a). On November 14, 1994, the United States District Court granted the motion (16a).

Thereafter, Bayliner and Perko filed motions to dismiss on the grounds that federal maritime law applied and that the three year federal maritime limitations period of 46 U.S.C. § 763a applied to time-bar the action (1a, 16a). By Order, filed May 1995, the Supreme Court of the State of New York for the County of New York denied the motions to dismiss and granted Ms. O'Hara's cross-motion to consolidate the two actions (15a). In holding that federal maritime law did not apply, the court held that Ms. O'Hara:

> was injured on . . . the boat [which] was at rest very close to the shore, and the individuals on board were using it for purely recreational purposes. . . . as a raft or diving board . . . The cleat . . . could have been any attachment . . . a nail, which if defectively designed or attached to a platform incorrectly, could . . . caus[e] injury. Finally, the accident itself, a slip and fall, is not unique to maritime injuries . . . and is part of the traditional tort jurisdiction under which a state allows to citizens to seek recompense for injuries. . . . The cases cited by defendants [Bayliner] . . . are not convincing. . . . Here, no threat or potential disruption of maritime commercial interests was involved. Therefore, the Court holds that admiralty law does not apply in the instant case.

(17a). Bayliner and Perko appealed to the Appellate Division, First Department which affirmed without opinion (12a). Associate Justice Wallach concurred in the affirmance but dissented with respect to the application of federal maritime law (12a).

The Court of Appeals of New York, by Opinion, dated March 25, 1997 reversed holding:

> . . . the factual allegations of this case — a vessel and incident on the navigable waters of Huntington Bay — neatly and easily fall within the United States Supreme Court's sweeping maritime nexus prerequisite.

(8a).

REASONS FOR GRANTING THE WRIT

The Supreme Court sharply curtailed the scope of federal maritime law and rejected a bright line test in determining the applicability of federal maritime law. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 255 (1972). *Executive Jet* has been repeatedly reaffirmed. *Jerome B. Grubart, Inc. v. Great Lakes Bridge & Dock Company*, 513 U.S. 527, 115 S. Ct. 1043 (1995); *see Foster v. Peddicord*, 826 F.2d 1370 (4th Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988); *Delta County Ventures Inc. v. Magana*, 986 F.2d 1260 (9th Cir. 1992). Invoking federal maritime law requires determining whether the tort occurred on navigable waters, the location test, and whether the alleged wrong bears a significant relationship to traditional maritime activity, the connection test. *Grubart*, 115 S. Ct at 1048. The connection test requires assessing the general features of the type of incident involved to determine whether the incident has a potentially disruptive impact on maritime commerce and determining whether the general character of the activity giving rise to the incident demonstrates a substantial relationship to traditional maritime activity. *Id.*

The holding that vessels in navigable waters with a defect potentially disrupt maritime commerce without consideration of the particular defect with respect to the case involved (7a), and that the presence of an anchored, engine-off vessel in navigable waters constitutes operation of a boat akin to storage at a marina (8a), vitiates the Supreme Court precedents and principles with respect to federal maritime law. The resulting decision of the Court of Appeals that "the factual allegations of this case — a vessel and incident on the navigable waters" creates a bright line strict locality rule in flat-out-conflict with the Supreme Court's precedents repeatedly rejecting such a rule. *Grubart*; *Sisson v. Ruby*, 497 U.S. 358, 364 n.2 (1990); *see also Stanley v. Bertram-Trojan, Inc.*, 855 F. Supp. 657, 658 (S.D.N.Y.

1994) (no preemption of State's common law negligent design claim involving a latch causing leg injury to guest on recreational boat in navigable waters); *McGuire v. City of New York*, 192 F. Supp. 866, 871 (S.D.N.Y. 1961) ("The touchstone . . . was not merely one of local concern but was in fact a thing having an intimate relation with navigation and interstate and foreign commerce. . . ."); *see also Madderns v. Fox Film Corp.*, 205 A.D. 791, 200 N.Y.S. 344 (3d Dep't 1923), *aff'd*, 237 N.Y. 614 (1924) (federal maritime law held inapplicable to slip and fall on docked boat in navigable waters).

I.

THE FEDERAL MARITIME LAW PREEMPTION OF STATE LAW REMEDIES IN SLIP AND FALL PERSONAL INJURY CASES OCCURRING ON AN ANCHORED, ENGINE-OFF WATERSKI BOAT ENGAGED IN AQUATIC NON-COMMERCIAL RECREATIONAL ACTIVITY IN SHALLOW NAVIGABLE WATERS FIFTEEN FEET FROM THE BEACH EXTENDS THE REACH OF FEDERAL MARITIME LAW BEYOND *EXECUTIVE JET* AND CREATES A BRIGHT LINE STRICT LOCALITY RULE IN CONFLICT WITH THE SUPREME COURT'S REPEATED REJECTION OF SUCH A BRIGHT LINE TEST.

When federal maritime law applies is understood reasonably well. *Grubart*, 115 S. Ct. at 1055. Generally, actions involving vessels on navigable waters engaged in maritime commerce, including ocean cruise liner passenger ships, or navigation are within admiralty jurisdiction and actions involving pleasure boats on navigable waters such as a slip and fall personal injury action which do not involve maritime commerce or navigation are not within admiralty. *Grubart*, 115 S. Ct. at 1048-49; *see Foster*, 826 F.2d at 1370; *Delta*, 986 F.2d at 1260; *Smith v.*

Knowles, 642 F. Supp. 1137 (D. Md. 1986); *see also Madderns*; *Admiralty And Maritime Law* § 3.5, p. 83 (2d ed. 1994) (water accidents involving swimming, diving and other activities do not satisfy the maritime relationship requirement absent vessel navigation).

Similarly, product liability claims involving boats on navigable waters not engaged in maritime commerce or navigation are not generally preempted by federal maritime law. *H2O Houseboats Vacations, Inc. v. Hernandez*, 103 F.3d 914 (9th Cir. 1996); *Allen v. Minnstar, Inc.*, 8 F.3d 1470, 1477-78 (10th Cir. 1993) (citing to *Pree v. Brunswick Corp.*, 983 F.2d 863 (8th Cir. 1993) and to *Elliot v. Brunswick Corp.*, 903 F.2d 1505 (11th Cir. 1990), *cert. denied*, 498 U.S. 1048 (1991); *Hutt v. Gibson Fiber Glass Products, Inc.*, 914 F.2d 790 (6th Cir. 1990); *Martell v. Boardwalk Enterprises, Inc.*, 748 F.2d 740 (2d Cir. 1984); *Stanley*, 855 F. Supp. at 657; *Seymour v. Brunswick Corporation*, 655 So. 2d 892 (Miss. 1995); *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W. 2d 246, *cert. denied, Vivian Indus. Plastics, Inc. v. Moore*, 115 S. Ct. 664 (1994); *Woltering v. Outboard Marine Corp.*, 615 N.E. 2d 86 (Ill. App. Ct. 1993), *cert. denied, Outboard Marine Corp. v. Woltering*, 115 S. Ct. 1270 (1995).

It is well settled that "pleasure boats themselves [have] little to do with the maritime commerce lying at the heart of the admiralty court's basic work." *Grubart*, 115 S. Ct. at 1048 (citing to *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982)). Federal maritime law applied in *Foremost* because navigational activity was involved. Navigational activity regardless of a boat's recreational status is decisive. Absent navigational activity or maritime commerce, the distinction between commercial vessels and pleasure boats remains significant. A case that involves a recreational boat is likely not within admiralty unless navigational activity and/or maritime commerce is involved.

Cases involving maritime commerce, including ocean cruise liner passenger ships, which hold federal maritime law applicable in various circumstances are not generally applicable to cases involving recreational boats unless navigational activity is involved.

Thus, the cases involving navigating vessels and maritime commerce cited to by the Court of Appeals and by the respondents are not applicable to the case at bar (6a). The "gangway", an opening for loading and unloading freight or for ocean cruise liner passengers, *White v. United States*, 53 F.3d 43 (4th Cir. 1995), is a characteristic of maritime commerce. These cases do not represent "ever-widening Supreme Court precedents" but merely further reasonable expectations of when federal maritime law should apply.

Notably, there were no maritime concerns involved in the case at bar (17a). The case did not involve navigation or a boat collision — the engine was off and the boat was anchored and no one was at the controls. Thus, the action is a non-navigating and non-operating boat case. The case is an aquatic strictly non-commercial recreational activity case wherein Ms. O'Hara was a guest among other teenage friends on the boat which was merely a platform to jump off into three feet of shallow water fifteen feet from the beach. *Foster*, 826 F.2d at 1376 ("[w]hile the vehicle involved was a boat . . . it might just as easily have been a fixed diving platform for the purpose to which it was put. As such, the structure and the accident has no more connection with the ordinary stuff of admiralty than do accidents on piers.' "). The action is a typical State law slip and fall personal injury case. *Smith; see also Madderns.*

The uniformity necessary for maritime commerce does not apply with equivalent force to aquatic recreational activity and indeed may be inimical to aquatic recreation. Whereas the cleat

for maritime purposes may have for generations remained what it is, it has not for aquatic recreational activity. Thus, the design defects at bar where the cleat was not recessed, sharp rather than blunt edged and not placed differently in accordance with the state of the art on aquatic recreational waterski boats.

Federal maritime law preemption is generally for the purpose of or under the principle of uniformity. *Butler v. American Traveler Co.*, 887 F.2d 20, 22 (1st Cir. 1989) (need to address non-uniformity of maritime law in passenger cruise ship case); *In re Ludwig Mowinckels Rederi*, 25 N.Y. 2d 576, 307 N.Y.S. 2d 660, 663 (1970) (need to secure a single and uniform body of maritime law in maritime employment case); *Alvez v. American Export Lines*, 46 N.Y.S. 2d 634, 415 N.Y.S. 2d 979, 981 (1979), *aff'd*, 446 U.S. 274 (1980) (maritime matters require uniform body of national law in maritime employment case); *Haggerty v. Moran Towing and Transport Co.*, 162 A.D. 2d 191, 556 N.Y.S. 2d 316 (1st Dep't 1990) (to secure uniform body of maritime law in seamans' case); *Mink v. Genmar Indus. Inc.*, 29 F.3d 1547 (11th Cir. 1994) (need for uniformity in boat navigational case); *Wahlstrom v. Kawaski Heavy Indus. Ltd.*, 4 F.3d 1089 (2d Cir. 1992) (stressing need for uniformity in maritime actions in boat collision case).

The need for uniformity is not of preeminent importance, particularly, with respect to aquatic recreational activities or other non-maritime commerce activity *Calhoun v. Yamaha Motor Corp.*, 40 F.3d at 622 (3d Cir. 1994), *aff'd, Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619 (1996) ("concept of uniformity has a good deal less weight than has been thought"); *American Dredging Co. v. Miller*, 114 S. Ct. 981, 987 (1994) (federal maritime law does not preempt state forum non conveniens doctrine); *Parker v. Motor Boat Sales*, 314 U.S. 244, 248 (1941) (rejection of the concept that State may not interfere with harmony and uniformity of admiralty law); *Ballard Shipping*

Co. v. Beach Shellfish, 32 F.3d 623, 628 (1st Cir. 1994) (Supreme Court no longer construes the Admiralty Clause as requiring rigid national uniformity).

Stressing uniformity often time defeats the necessary maritime nexus and caused the attempted "invocation of admiralty jurisdiction [where it] seems almost absurd". *Executive Jet*, 409 U.S. at 255; *see, e.g., Petro v. Jad Yacht Charter, Ltd.*, 854 F. Supp. 698 (D. Hawaii 1994) (attempt to invoke admiralty jurisdiction to on-shore fight by drunk cruise line passengers); *In re Nolty J. Theriot*, 841 F. Supp. 209 (S.D. Texas 1994) (same attempt to crew members' car accident on way to vessel); *Atlantic Mut. v. Balfour MaClaine Intern.*, 968 F.2d 196 (2d Cir. 1992) (same attempt to coffee stored at inland warehouse).

A. The Absence Of A Potential To Disrupt Commerce And Of A Substantial Relationship To Traditional Maritime Activity.

The potential to disrupt commerce must pose "more than a fanciful risk to commercial shipping." *Grubart*, 115 S. Ct. at 1051. Thus, while the potential to disrupt commerce involves looking at the general features of the incident at an intermediate level of possible generality, *id.*, it does not involve the fanciful use of imagination to recreate the locality of where the activity occurred, i.e., from shallow beach water to the busiest of nearby maritime thoroughfares as was done in *Matter of Bird*, 794 F. Supp. 575, 579 (D.S.C. 1992), or conjuring up the most disruptive rescue efforts imaginable.

The description of the general features of the incident at bar is not protecting sailors engaged in maritime activity from defective equipment. The case at bar did not involve any maritime employment or seaman nor navigational activity. There

was no marina, storage, berthing or maintenance involved. The boat had been anchored, engine-off, and was a platform in connection with aquatic strictly non-commercial recreational activity in shallow beach water. As it actually happened, there was no disruption of any kind whatsoever and the examination of the incident at an intermediate level of generality also establishes the absence of the potential to disrupt commerce. *Smith*, 642 F. Supp. at 1137 (jumping off pleasure boat could not be construed to have impeded maritime commerce)

In any event, not every accident in navigable waters that might disrupt maritime commerce falls within admiralty. *Foremost*, 457 U.S. at 675; *Sisson*, 497 U.S. 358, 361 (1990). This is of particular significance with respect to pleasure boats having "little to do with . . . maritime commerce." *Grubart*, 115 S. Ct. at 1048; *see also Admiralty and Maritime Law*, § 3.5, p. 83 (2d ed. 1994) (water accidents involving swimming, diving and other activities absent vessel navigation, do not support admiralty).

Focusing on the kind of injury — slip and fall — or on the activity — recreational — does not evidence a sufficient connection to maritime commerce. The injury at bar is not unique to boats (18a). *Montgomery v. Harrold*, 473 F. Supp. 61, 64 (E.D. Mich. 1979) (deaths from lethal boat fumes on pleasure craft docked on navigational waters; no admiralty where no navigation or trade involved); *see also H2O Houseboat Vacation Inc. v. Hernandez*, 103 F.3d 914 (9th Cir. 1996) (same, except boat tied to shore). The instrumentality causing the deaths in *Montgomery* and *H2O* were the boat engines causing the fumes. The instrumentality at bar is the boat cleat. Neither instrumentality is unique to maritime commerce. The same injuries just as well could have occurred and have indeed occurred on land (18a). Federal maritime law preemption with respect to the anchored, engine-off boat at bar engaged in aquatic

strictly non-commercial recreational activity in shallow beach water far from any maritime commerce of any kind whatsoever does not stand for the proposition that federal maritime law ordinarily applies to torts involving a vessel on navigable waters. *Grubart*, 115 S. Ct. at 1053. Instead, it stands for the proposition that federal maritime law will always apply to vessels on navigable waters regardless of the circumstances. Thus, the scope of admiralty jurisdiction is greater than it had been before *Executive Jet. See, e.g., Foster; Delta; Stanley; Madderns.*

II.

THE APPLICATION OF THE FEDERAL MARITIME LAW LIMITATIONS PERIOD OF 46 U.S.C. § 763a TO AN ANCHORED, ENGINE-OFF AQUATIC NON-COMMERCIAL RECREATIONAL BOAT SLIP AND FALL CASE IS A CASE OF FIRST IMPRESSION WITHOUT PRECEDENT.

The limitations period of 46 U.S.C. § 763a was enacted so that maritime torts had a uniform limitations period. *See* H.R. Rep. No. 737, 96th Cong., 2d Sess. 1-2, reprinted in 1980 U.S. Cong. & Admin. News 3303. It does not nor was it ever meant to apply to state law claims. A review of the United States Code Service annotations evidence that § 763a does not apply to anchored, non-navigating aquatic non-commercial recreational boat slip and fall cases because the cases cited in the annotations are maritime commerce cases, including maritime employment and ocean cruise liner passenger ship cases or navigational "rules of the road" cases that are in stark contrast to the case at bar.

In any event, even if § 763a applied at bar, the State's applicable statute of limitations CPLR § 214 and infancy toll CPLR § 208 would, nevertheless, apply pursuant to the express language of § 763a. The § 763a language "[u]nless otherwise

specified by law", expressly provided for the application of the State statute of limitations CPLR § 214 and infancy toll CPLR § 208. This language expressly recognizes not only a State's strong, legitimate and historic police powers with respect to regulating activities on navigable waterways and also the joint exercise, along with the federal government, of some of those activities but also the presumption against the federal preemption of the State's police powers.

This is one of the reasons why the cases cited in the annotations to § 763a are all cases of maritime commerce and navigating boat cases. In those cases, there are no applicable State statutes of limitations. Not only is the case at bar not one of those type of cases cited in the annotations to § 763a but also the case at bar has the applicable State statute of limitations of CPLR § 214. Since there is a law otherwise specified in the case at bar, the limitations period of § 763a does not apply.

It is well settled and beyond dispute that the State's strong, legitimate and historic police power with respect to regulating activities on navigable waterways has been neither expressly not impliedly preempted. Indeed, the Supreme Court's *Executive Jet* decision and decisions since, establish that admiralty jurisdiction is limited and does not automatically nor presumptively preempt the State's regulatory powers over maritime matters. *American Dredging*, 114 S. Ct. at 987 (State forum non conveniens doctrine not preempted); *Stanley*, 855 F. Supp. at 657. The presumption is that the State's interests are not superseded or preempted absent express and clear acts of Congress. *See Standard Marine Service, Inc. v. Jorling*, 214 A.D. 2d 424, 625 N.Y.S. 2d 186 (1st Dept. 1995) (federal law does not preempt State law with respect to the operation of vessels); *Berman Enterprises, Inc. v. Jorling*, 793 F. Supp. 408, 416 (E.D.N.Y. 1992).

When statutory language is unambiguous, a court will ordinarily give effect to the plain meaning of the words and apply the statute according to its express terms. When the language is unambiguous, there is no need to resort to legislative history or extraneous materials in an attempt to garner what was intended. Thus the assertion that the express language "unless otherwise specified by law" restrictively means "federal law" is not only contrary to the plain meaning of § 763a's express language but also unreasonable, particularly, because a statute's express language should not be preempted by an interpretation of the supposed intent when the language is unambiguous, there is a presumption against preemption and the goal of uniformity is not of the preeminent importance once thought. *Calhoun*, 40 F.3d at 622; *Parker*, 314 U.S. at 248 (rejection of the concept that the State may not interfere with harmony and uniformity of admiralty law).

The construction of § 763a's language "unless otherwise specified by law" to mean solely federal law comes about not only by ignoring the express language, the State's strong interests and the presumption against preemption but also by reading into the language the additional word "federal" to change the express language and therefore to change its meaning. The interpretation of intent to be contrary to the plain meaning of the express language results in elevating the asserted intent above the express language.

Furthermore, the unavailability of a State law remedy under admiralty does not vitiate the remedy. *Kossick v. United Fruit Co.*, 365 U.S. 731, 738-740 (1961). Unless there are established and inflexible rules requiring the denial of the remedy, the remedy should not be withheld because under "the humane and liberal character of . . . admiralty [it is better] to give than withhold the remedies". *Alvez*, 46 N.Y. 2d at 643, 415 N.Y.S. 2d at 984 (quoting from *Moragne v. States Mar. Lines*, 398 U.S.

375, 387 (1970)). There are no applicable rules at bar. The three year § 763a limitation period and the CPLR § 214 statute of limitations are the same. The State merely provides a remedy that is not available under admiralty. Thus there is not an "irreconcilable conflict"; rather there is merely an additional remedy.

The need for uniformity is not a "rule" but a principle. The need for uniformity is a guidepost and not "inflexible". *Calhoun*, 40 F.3d at 622, (uniformity entitled to good deal less weight than previously thought); *Parker*, 314 U.S. at 245 (State may interfere with harmony and uniformity of admiralty law); *Ballard*, 32 F.3d at 628 (admiralty does not require rigid uniformity). Accordingly, the CPLR § 208 infancy toll is not preempted even if the § 763a limitations period applied at bar.

Additionally, State law may modify or supplement maritime law when it is silent. *In re Cassaretakis*, 289 N.Y. at 128, 44 N.E. 2d at 396 (state may modify remedies enforceable in admiralty); *Stuto v. Coastal Dry Dock and Repair Corp.*, 153 A.D. 2d 937, 545 N.Y.S. 2d 743, 745 (2d Dept. 1989). When federal maritime law has not specifically provided for a given situation, the State law can supplement the federal law. *In re DFDS Seaways (Bahamas) Ltd.*, 684 F. Supp. 1160, 1162 (S.D.N.Y. 1987); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986) (federal wrongful death statutes either preempt and/or preserve state wrongful death causes of action). Since § 763a is silent with respect to tolling, and the federal maritime law has not specifically provided for infancy, the State's CPLR § 208 tolling provision applies to supplement federal maritime law. *In re Cassaretakis*, 284 N.Y. at 128, 44 N.E. 2d at 396.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL J. DEVEREAUX
Counsel of Record
Attorney for Petitioner
200 Rector Place, Suite 12D
New York, New York 10280
(212) 783-9466

APPENDIX A — OPINION OF THE COURT OF APPEALS OF NEW YORK DATED MARCH 25, 1997

Eileen O'HARA, Respondent,
v.
BAYLINER, et al., Appellants,
Defendants.

No. 40.

Court of Appeals of New York.

March 25, 1997.

* * *

BELLACOSA, J.:

In 1990, plaintiff, at age 16, was seriously hurt as she entered about 3 feet of water from a Bayliner water-ski boat anchored approximately 15 feet offshore. Her injuries were caused by a cleat affixed to the boat. Plaintiff's complaint alleges that the cleat was defectively designed and positioned, and that the boat was defectively manufactured due to the lack of nonskid material and a handrail. Defendants-appellants include the boat's designer, manufacturer and distributor, and the designer, manufacturer and distributor of the cleat. Other defendants are plaintiff's companion, who operated the boat, and his father, who owned the boat.

Supreme Court and the Appellate Division denied defendants' (Bayliner and Perko) respective motions to dismiss. Our courts held that Federal admiralty law (which has no infancy tolling protection against its three-year Statute of Limitations) did not govern this tort action. Therefore, the New York courts

held that New York State's tolling provision against the running of the Statute of Limitations left plaintiff's action timely (see, CPLR 214; CPLR 208). The Appellate Division granted defendants leave to appeal to our Court on a certified question. We now reverse, answer the question in the negative and grant the motion to dismiss the complaint, as barred by 46 USC app § 763a.

Despite a complicated procedural path, the dispositive issue for us to resolve in this case is relatively straightforward. We must decide whether Federal maritime law governs, based on pertinent United States Supreme Court precedents and principles. We conclude that it does and that the New York State Supreme Court applied an overly narrow test for resolving the threshold question. It reasoned that "[p]laintiff was injured on a pleasure boat, that is, a craft having no relationship to the traditional and most significant concern of admiralty jurisdiction — the protection of those engaged in commerce." Additionally, the nisi prius court noted that "while Huntington Bay may constitute navigable waters, the boat was at rest very close to the shore, and the individuals on board were using it for purely recreational purposes." The Appellate Division affirmed for the reasons stated by Supreme Court, with one Justice concurring and dissenting in part (224 A.D.2d 353).

We must first look to the test promulgated by the United States Supreme Court for determining the nature and classification of a maritime tort. Its teaching governs the exclusive, pre-emptive and applicable admiralty jurisdiction. Historically, "[i]f the wrong occurred on navigable waters, the action is within admiralty jurisdiction" (Executive Jet Aviation v. City of Cleveland, 409 U.S. 249, 253 [1972]). In that case, involving the crash-landing and sinking of a jet aircraft in Lake

Erie, admiralty jurisdiction was found lacking. The United States Supreme Court concluded that admiralty jurisdiction applies when the wrongs (1) "occurred on navigable waters," and (2) "bear a significant relationship to traditional maritime activity" (id., at 253, 268). The reasoning and test as to the second prong, which constitutes an extension of the more venerable "locality" rule, are deemed "far more consistent with the history and purpose of admiralty" (id., at 268). This reflected the United States Supreme Court's "first clear departure from the strict locality test" (Sisson v. Ruby, 497 U.S. 358, 361).

In Foremost Ins. Co. v. Richardson (457 U.S. 668 [1982]), a case involving the collision of two pleasure boats on a river in Louisiana, the United States Supreme Court determined that "the Executive Jet requirement that the wrong have a significant connection with traditional maritime activity is not limited to the aviation context" (id., at 674). It definitely declared that Executive Jet's "rationale in rejecting a strict locality rule also applies to the maritime context" (id., at 673). In Foremost, the Court stated that "[b]ecause the 'wrong' here involves the negligent operation of a vessel on navigable waters, * * * it has a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction" (id., at 674). Significantly, the Court focused on "[t]he potential disruptive impact of a collision between boats on navigable waters" (id., at 675). Pertinently to the problem before us, the United States Supreme Court expressly rejected the notion that admiralty jurisdiction applies only to commercial maritime activity, or, more specifically, "commercial" boats, as contrasted to "pleasure" boats (id., at 674-675). In Sisson v. Ruby (497 U.S. 358, supra [1990]), the Supreme Court added that maritime jurisdiction obtained when a pleasure yacht was destroyed by fire while docked at a Lake Michigan marina, destroying the yacht and damaging the marina

and several vessels moored nearby (id., at 360). The Supreme Court again invoked the "potentiality" linchpin and reasoned that "such a fire has a potentially disruptive impact on maritime commerce, as it can spread to nearby commercial vessels or make the marina inaccessible to such vessels" (id., at 362). In rejecting the argument that the "potential" effect on maritime commerce was minimal because no commercial vessels were docked at the marina when the fire occurred, the Supreme Court stated:

> We determine the potential impact of a given type of incident by examining its general character. The jurisdictional inquiry does not turn on the actual effects on maritime commerce of the fire on Sisson's vessel; nor does it turn on the particular facts of the incident in this case, such as the source of the fire or the specific location of the yacht at the marina, that may have rendered the fire on the [yacht] more or less likely to disrupt commercial activity. Rather, a court must assess the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity (id., at 363 [emphasis in original]).

In light of the above explanation, the Sisson court turned to the second half of the Foremost test, "under which the party seeking to invoke maritime jurisdiction must show a substantial relationship between the activity giving rise to the incident and traditional maritime activity" (id., at 364). The Court stated that the first step in this analysis involves defining the relevant

activity (id.). Characterizing the "activity" by the "general conduct" from which the incident arose, as opposed to the "particular circumstances," the Court concluded that it "need not ascertain the precise cause of the fire to determine what 'activity' Sisson was engaged in; rather, the relevant activity was the storage and maintenance of a vessel at a marina on navigable waters" (id., at 364-365). The second inquiry of the maritime connection test, according to the Supreme Court, is whether the activity has the requisite relationship with traditional maritime activity. Building on its other modern enlargements of the maritime jurisdictional circumference, the Supreme Court rejected the contention that only pure navigation should be characterized as substantially related to traditional maritime activity. It tied its precedents together with a core policy line: "The need for uniform rules of maritime conduct and liability is not limited to navigation, but extends at least to any other activities traditionally undertaken by vessels, commercial or noncommercial" (id., at 366). Sisson's application and holding thus wound up with the conclusion that "the storage and maintenance of a vessel at a marina on navigable waters is substantially related to 'traditional maritime activity' given the broad perspective demanded by the second aspect of the [Executive Jet — Foremost] test" (id., at 367).

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co. (513 U.S. 527; 115 S. Ct. 1043 [1995]) rounds out the analysis for present purposes. There, the Supreme Court found admiralty jurisdiction over an action brought by a barge owner to limit its liability for damages resulting from the flooding of a freight tunnel running under a navigable river. The damage allegedly resulted from the negligent use of a crane on a barge to drive piles into a riverbed above the tunnel. The Court first determined that the locality test was met because the incident

involved a "vessel" on navigable waters (id., at 1049). The "vessel" there was a barge fastened to the river bottom for use as a work platform (id.). The Court reasoned that "at other times, it was used for transportation" (id.). The Court then applied its variation of the Sisson two-step analysis to determine whether the maritime nexus test was satisfied (id., at 1050-1051). The Court resolved that the incident had a potential to disrupt maritime commerce, reasoning that "damaging a structure beneath the riverbed could lead to a disruption in the water course itself" and that "damaging a structure so situated could lead to restrictions on the navigational use of the waterway during required repairs" (id., at 1051). The Court finally concluded that the "activity giving rise to the incident" — "repair or maintenance work on a navigable waterway performed from a vessel" — had a substantial relationship to a traditional maritime activity (id.). Owning up to "the difficulty of escaping the [admiralty] case law," the Supreme Court in Grubart candidly observed that although "these cases do not say that every tort involving a vessel on navigable waters falls within the scope of admiralty jurisdiction no matter what, they do show that ordinarily that will be so" (id., at 1053).

The plain reading and application of these Supreme Court precedents leads to the inescapable conclusion that Federal admiralty jurisdiction governs the instant controversy. The binding force of the admiralty jurisprudence is illustratively manifest in consistent applications of the sweeping Executive Jet test, appreciated more fully together with its ensuing, ever-widening Supreme Court precedents (see, e.g., White v. United States, 53 F.3d 43 [security guard lost her balance when stepping on platform at end of gangway, on disembarking public vessel docked at pier at naval base]; Mink v. Genmar Industries, Inc., 29 F.3d 1543 [passenger slammed into deck of craft as it was

being operated at a high rate of speed]; Butler v. American Trawler Co., Inc., 887 F.2d 20 [passenger injured while attempting to board docked ship]).

We now turn to our application of these principles and precedents. As Huntington Bay is surely a navigable body of water, the locality test, the first prong under Executive Jet and Foremost, is readily satisfied. The second prong, maritime connection, as applied by Grubart, involves another two-step inquiry (Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 115 S. Ct. 1043, 1050-1051, supra). The first is whether the incident involved had the potential to disrupt maritime commerce (id.). Examining "general features" as required by Sisson, the type of incident that occurred here is demonstratively "likely to disrupt commercial activity" (Sisson v. Ruby, 497 U.S. 358, 363, supra). No sustainable analysis or method to escape the force of the United States Supreme Court's precedents, centering on potentiality of interference with maritime commerce, are present here. On the contrary, that key potentiality is plainly operative under the facts of this case, given the nature and manner of the accident, which resulted from an allegedly defective apparatus on the boat. "[O]ne of the purposes of admiralty law is to protect sailors from defective equipment while they are engaged in maritime activity" (Hassinger v. Tideland Electric Membership Corp., 781 F.2d 1022, 1028). Therefore, placing a vessel into navigable water with a defect sufficiently carries the potential to disrupt maritime commerce by creating a hazardous situation to nearby vessels and all those engaged in maritime activity. Additionally, the existence of a dangerous and, possibly, injurious situation "could lead to restrictions on the navigational use of the waterway" (Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 115 S. Ct. 1043, 1051, supra). Thus, in light of the breadth

of this prong of the test, this case qualifies as potentially disruptive of maritime commerce.

The second step addresses "whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity" (id., at 1051). The operation of boats in navigable waters plainly fits within the substantial relationship test (see, Foremost Ins. Co. v. Richardson, 457 U.S. 668, 674, supra), as does storing them at a marina (see, Sisson v. Ruby, 497 U.S. 358, 360, supra). Therefore, the factual allegations of this case — a vessel and incident on the navigable waters of Huntington Bay — neatly and easily fall within the United States Supreme Court's sweeping maritime nexus prerequisite.

Concluding that the instant case is a Federal admiralty matter, we must then accept the Federal Statute of Limitations, which is designed to effectuate the Congressional intent of a uniform standard (46 USC app § 763a; see, H.R.Rep. No. 737, 96th Cong., 2d Sess. 1-2, reprinted in 1980 U.S.Code Cong. & Admin. News 3303; Mink v. Genmar Industries, Inc., 29 F.3d 1543, 1547, supra; Butler v. American Trawler Co., Inc., 887 F.2d 20, 22, supra). In Lerner v. Karageorgis Lines (66 N.Y.2d 479), the New York Court of Appeals noted that "[i]n maritime cases, State courts must apply Federal law 'to secure a single and uniform body of maritime law' " (id., at 484-485 [quoting Matter of Rederi (Dow Chem. Co.), 25 N.Y.2d 576, 581, cert. denied, 398 U.S. 939]). We further noted in Lerner that "[a] State court may not limit a party's substantive rights by applying its own procedural rules if those rules would 'significantly affect the result of the litigation, i.e., would be outcome determinative' " (Lerner v. Karageorgis Lines, supra, 66 N.Y.2d, at 485 [quoting Matter of Rederi, supra, 25 N.Y.2d,

at 581]). With that guidance, we note that applying the New York State Statute of Limitations (see, CPLR 214) and its accompanying tolling provisions (see, CPLR 208) here would generate the sort of non-uniform procedural bar that we have disavowed.

The United States Supreme Court, moreover, has noted that although state courts are authorized to entertain maritime causes of action, "the extent to which state law may be used to remedy maritime injuries is constrained by the so-called 'reverse-Erie' doctrine which requires that the substantive remedies afforded by the States conform to governing Federal maritime standards" (Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 223; see, East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 864 ["(w)ith admiralty jurisdiction comes the application of substantive admiralty law"]; but see, Yamaha Motor Corp., U.S.A. v. Calhoun, 116 S. Ct. 619, 623 [citations omitted] ["[t]he exercise of admiralty jurisdiction * * * 'does not result in automatic displacement of state law' "]).

On a related aspect of this case, we are also satisfied that the exceptional Federal equitable tolling remedy is inapplicable to this case. Plaintiff and the partial dissent opinion at the Appellate Division mistakenly rely on Maxwell v. Swain (833 F.2d 1177) for the proposition that "[w]here suit has been filed within the period of limitation, a defendant has been put on notice of the claim, and service is effected within a reasonable time, there is little to be gained by refusing to toll the federal limitation because actual service of process was not achieved within the statutory period" (id., at 1178). The Maxwell court, however, expressly limited its holding to a lawsuit filed in a state court lacking venue (id.). No such circumstance is present or proffered here.

Appendix A

"Federal courts have typically extended equitable relief only sparingly" (Irwin v. Dept. of Veterans Affairs, 498 U.S. 89, 96). The well-settled and limited circumstances for equitable tolling of the statute of limitations are summarized as follows: (1) the plaintiff timely filed the complaint in the wrong forum (see, Burnett v. New York Central R. Co., 380 U.S. 424; Herb v. Pitcairn, 325 U.S. 77; Maxwell v. Swain, 833 F.2d 1177, supra; see also, American Pipe & Construction Co. v. Utah, 414 U.S. 538), (2) the defendant actively misled the plaintiff (see, Glus v. Brooklyn Eastern Dist. Terminal, 359 U.S. 231; Holmberg v. Armbrecht, 327 U.S. 392), or (3) the plaintiff in some extraordinary way had been prevented from complying with the limitations period (see, Osbourne v. United States, 164 F.2d 767).

This case does not qualify under any of these distinctly exceptional circumstances. In fact, federal courts "have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights" (Irwin v. Dept. of Veterans Affairs, 498 U.S. 89, 96, supra [citing Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151]). The extraordinary Federal equitable tolling remedy is thus not available to the plaintiff in this matter.

Accordingly, the order of the Appellate Division should be reversed, with costs, motions by the Bayliner defendants and the Perko defendants to dismiss the complaint as against them granted, and the certified question answered in the negative.

Order reversed, with costs, motions by the Bayliner defendants and the Perko defendants to dismiss the complaint as against them granted and certified question answered in the negative.

Appendix A

Chief Judge KAYE and Judges TITONE, SMITH, LEVINE, CIPARICK and WESLEY concur.

APPENDIX B — OPINION OF THE SUPREME COURT OF NEW YORK FOR THE APPELLATE DIVISION, FIRST DEPARTMENT DATED FEBRUARY 29, 1996

Eileen O'HARA, Plaintiff-Respondent,
v.
BAYLINER, et al., Defendants-Appellants,

and
Frank Tabone, et al., Defendants.

Supreme Court of New York, Appellate Division,
First Department.

Feb. 29, 1996.

* * *

Before MURPHY, P.J., and WALLACH, KUPFERMAN, ROSS and WILLIAMS, JJ.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered May 3, 1995, affirmed for the reasons stated by Goodman, J., with costs.

All concur except WALLACH, J. who concurs in part and dissents in part in a memorandum as follows:

WALLACH, Justice (concurring in part, dissenting in part)

In this action stemming from a personal injury suffered in 1990, Bayliner (manufacturer of the boat) was timely served with process in August 1993, but that original action was dismissed for failure to file proof of service of the summons and complaint in a timely fashion (CPLR 306-b). A new action

was commenced in 1994 against Perko (manufacturer of the cleat) as well as Bayliner. Both sets of defendants moved to dismiss on grounds of Statute of Limitations. Both motions were denied on the ground that New York's three-year Statute of Limitations on tort claims (CPLR 214) was tolled for plaintiff's infancy (CPLR 208).

I believe the IAS court erred in failing to recognize that this action is governed by Federal maritime law, since the injury complained of occurred on navigable waters (regardless how shallow), and bore a substantial relationship to traditional maritime activity by posing even a potential for interference with maritime commerce (Sisson v. Ruby, 497 U.S. 358, 110 S.Ct. 2892, 111 L.Ed.2d 292; Foremost Ins. Co. v. Richardson, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300; Matter of Paradise Holdings, 795 F.2d 756, cert. denied, 479 U.S. 1008, 107 S.Ct. 649, 93 L.Ed.2d 705; Matter of Bird, 794 F.Supp. 575). Under Federal maritime law, the three-year Statute of Limitations (46 USC, Appendix § 763a) is tolled where the defendant has actual notice of the pendency of the claim, as long as service is effected within a reasonable time thereafter (Maxwell v. Swain, 833 F.2d 1177). Inasmuch as Bayliner had notice of the claim within the three-year period, dismissal of that earlier action on purely procedural grounds should not result in plaintiff's action being time-barred. The Statute of Limitations was thus tolled, but not for the reasons stated by the IAS court and now adopted by the majority.

The result may be the same with regard to Bayliner, but the distinction becomes crucial with regard to the Perko defendants. Because maritime law controls, the State infancy toll is not available to salvage the case against the cleat manufacturer, who first received notice of these claims in 1994, well beyond the

applicable three-year period of limitations. Thus, Perko's motion to dismiss should have been granted.

APPENDIX C — ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE COUNTY OF NEW YORK, IAS PART 17 FILED MAY 3, 1995

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

INDEX NO.: 120163/93 & 122831/93
SEQUENCE NO: 001

EILEEN O'HARA

Plaintiff,

-against-

BAYLINER; BAYLINER MARINE CORP., et al.,

Defendants.

EMILY JANE GOODMAN, JUSTICE

Defendants Bayliner, Bayliner Marine Corporation d/b/a Bayliner, U.S. Marine, U.S. Marine Corporation d/b/a U.S. Marine, U.S. Marine Corporation, and Brunswick Marine Company, (the Bayliner defendants), move, pursuant to CPLR 3211 (a) (5) to dismiss the complaint. Defendants Perko, Inc., Perko Manufacturing Corp., and Perkins Marine Lamp & Hardware Corp. cross-move for the same relief on the same grounds. Plaintiff cross-moves to consolidate the action encaptioned O'Hara v. Bayliner, et. al., Index Number 122831/94 which had been removed to the Federal District Court for the Southern District, and subsequently remanded, with Index Number 120163/93, encaptioned O'Hara v. Bayliner, et. al. The 93 Index Number, named, in addition to the Bayliner defendants,

Appendix C

Gudziks Marine, Inc. and Frank and Thomas Tabone as defendants.

Both complaints allege that plaintiff was injured on August 12, 1990, disembarking from a Bayliner boat owned by Frank Tabone and operated by his son Thomas. At the time of the accident the boat was stopped in three feet of water approximately fifteen feet from the beach in Huntington Bay. Plaintiff was sixteen years old when the accident occurred. She states that she had gone "tubing", i.e., waterskiing using an inner tube pulled by a boat, with friends. Once the boat stopped and the engine turned off, "Tom Tabone jumped or dove off the boat and so did everyone else, including myself although not all at once." (Affidavit, Eileen O'Hara, January 29, 1995). When plaintiff's turn came to abandon ship, so to speak, she became impaled on a cleat affixed to the boat, incurring injuries requiring 140 stitches, staples and skin grafts.

By Notice of Removal dated September 9, 1994 the Bayliner defendants removed Index Number 122831/94 to the United States District Court for the Southern District. The Perko defendants consented to the removal. The basis for the removal was admiralty jurisdiction, (28 U.S.C. 1333) and diversity jurisdiction (28 U.S.C. 1332). Plaintiffs then moved in the federal court action to amend the complaint to include Frank and Thomas Tabone as defendants. That motion was granted on November 14, 1994. (Wood, J.). On November 22, 1994 Judge Wood remanded the action to this court because the addition of the Tabones as defendants had destroyed the federal court's diversity jurisdiction.

The threshold issue before the Court is whether federal admiralty law or New York law should be applied in this action.

Appendix C

Defendants' position is that because plaintiffs' causes of action "arose upon the navigable waters of the United States in connection with a traditional maritime activity," (Affirmation in Support of the Motion to Dismiss, Bayliner defendants), federal maritime law should apply. Federal maritime law provides for a three year statute of limitations with respect to plaintiffs' claims.

The United States Supreme Court has established the test for determining when admiralty jurisdiction and federal statutes should be applied in personal injury actions. Under *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249 (1972), the test is whether the injury occurred in navigable waters and whether there is a significant relationship between the injury suffered and the traditional concerns of maritime law, i.e., navigation or commerce. The *Executive Jet* criteria sharply curtailed the application of maritime law to injuries occurring during the operation of pleasure boats. (*See, Crosson v. Vance*, 484 F.2d 840, [4th Cir. 1973]). Courts look at whether a sufficient maritime nexus exists, including the functions and the roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of the injury; and traditional concepts of the role of admiralty law. See *Kelly v. Smith*, 485 F.2d 520, 525 (5th Cir. 1973). As applied to the instant case it is clear that the application of maritime law is unwarranted.

Plaintiff was injured on a pleasure boat, that is, a craft having no relationship to the traditional and most significant concern of admiralty jurisdiction — the protection of those engaged in commerce. Additionally, while Huntington Bay may constitute navigable waters, the boat was at rest very close to the shore, and the individuals on board were using it for purely recreational purposes. Defendants argue that Eileen O'Hara was

injured while "disembarking" from the craft, and thus engaged in a maritime activity with a specific meaning. In fact, a group of teenagers were engaged in using the boat as a raft or diving board to enter the water for recreational. The cleat which caused the injury could have been any attachment, for example, a rivet, a hook, a clamp or a nail, which if defectively designed or attached to a platform incorrectly, could penetrate the skin causing injury. Finally, the accident itself, a slip and fall, is not unique to maritime injuries, (See, *Keene Corp. v. United States*, 700 F.2d 836, [2d Cir. 1983]; *Smith v. Knowles*, 642 F. Supp. 1137 [D. Md. 1986]), and is part of the traditional tort jurisdiction under which a state allows its citizens to seek recompense for injuries.

The cases cited by defendants involving pleasure boats in which admiralty jurisdiction was upheld by the courts are not convincing. For example, in *Sison v. Ruby*, 497 U.S. 358 (1990), the Court held that a yacht, destroyed by fire at its mooring, could have endangered commercial vessels and disrupted commercial activity. Similarly, in *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1992), when two pleasure boats collided, the Court held that traditional maritime interests were involved because of the threat to navigation and the disruption of commerce. In *Mink v. Genmar Industries, Inc.*, 29 F.3d 1543 (11th Cir. 1994), the court held that admiralty jurisdiction was appropriate because the injury (plaintiff was thrown to the deck of the boat that did not have hand rails and was being operated at high speed) would not have occurred nor would the defect have "manifested" itself, were the boat not being operated as a vessel in navigable waters. The court cited the potential threat the accident posed to commercial vessels. Here, no threat or potential disruption of maritime commercial interests was involved. Therefore, the Court holds that admiralty law does not apply in the instant case.

Appendix C

Under New York law, the applicable three year negligence statute of limitations (CPLR 214) was tolled by plaintiff's infancy (CPLR 208). Plaintiff was sixteen on August 12, 1990. The toll extended her time to commence this action to three years after her eighteenth birthday. Therefore, the commencement of the action, by purchase of an Index Number and filing of the summons and complaint on August 8, 1994, was timely.

Plaintiffs' cross-motion to consolidate Index Nos. 120163/93 and 122831/94 is granted. There is no dispute that these cases present common issues of law and fact. (*Chinatown Apts. v. NYC Transit Authority*, 100 A.D.2d 824). The parties are directed to contact the Clerk of Part 17 within 30 days to schedule a discovery conference and set a discovery schedule.

Accordingly, the motions to dismiss by the Bayliner defendants and the Perko defendants are denied. The cross motion by plaintiffs to consolidate Index Nos. 120163/93 and 122831/94 is granted; it is hereby

ORDERED that the cross motion to consolidate is granted and the above-captioned action is consolidated in this Court with Eileen O'Hara v. Bayliner, Bayliner Marine Corp., et al, Index No. 120163/93, under Index No. 122831/94 and the consolidated action shall bear the following caption:

EILEEN O'HARA

Plaintiff,

-versus-

BAYLINER; BAYLINER MARINE CORPORATION d/b/a BAYLINER; BAYLINER MARINE CORPORATION; U.S.

Appendix C

MARINE; U.S. MARINE CORPORATION d/b/a U.S. MARINE; U.S. MARINE CORPORATION; PERKO, INC.; PERKO MANUFACTURING CORP.; PERKINS MARINE LAMP & HARDWARE CORP.; BRUNSWICK MARINE COMPANY; FRANK TABONE; THOMAS TABONE; GUDZIKS MARINE, INC.,

Defendants.

and it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleading in the consolidated action; and it is further

ORDERED that upon service on the Clerk of this Court of a copy of this order with notice of entry, the Clerk shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation, and it is further

ORDERED that a copy of this order with notice of entry shall also be served upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark his records to reflect the consolidation.

The foregoing constitutes the decision and order of this court.

Dated: 4/27/95

ENTER:

s/ Emily Jane Goodman
J.S.C.
EMILY JANE GOODMAN

No. 96-2023

Supreme Court, U.S.
FILED
JUL 24 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

EILEEN O'HARA,

Petitioner,

—against—

BAYLINER; BAYLINER MARINE CORPORATION d/b/a BAYLINER; BAYLINER MARINE CORPORATION; U.S. MARINE; U.S. MARINE CORPORATION d/b/a U.S. MARINE; U.S. MARINE CORPORATION; PERKO, INC.; PERKO MANUFACTURING CORP.; PERKINS MARINE LAMP & HARDWARE CORP.; BRUNSWICK MARINE COMPANY; FRANK TABONE; THOMAS TABONE; GUDZIKS MARINE, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

RESPONDENTS' BAYLINER BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN G. INGRAM*
JULIE PATEMAN WARD
HEALY & BAILLIE, LLP
Attorneys for Respondents Bayliner; Bayliner Marine Corporation d/b/a Bayliner; Bayliner Marine Corporation; U.S. Marine; U.S. Marine Corporation d/b/a U.S. Marine; U.S. Marine Corporation; Brunswick Marine Company
29 Broadway
New York, New York 10006
(212) 943-3980

*Counsel of Record

29 pp

QUESTIONS PRESENTED

Whether New York State Court of Appeals correctly applied *Executive Jet* and its progeny in determining that federal maritime law governed products liability action which alleged that pleasure boat was defectively manufactured due to lack of nonskid material and handrail and cleat affixed to vessel was defectively designed and positioned when petitioner's injury occurred on navigable waters of the United States while disembarking the vessel?

Whether New York State Court of Appeals correctly applied 46 U.S.C. App. § 763a, enacted by Congress as the uniform national limitations period of three years for maritime torts, exclusive of state statutes thus rendering this action time barred?

PARTIES TO THE PROCEEDINGS

Brunswick Corporation owns the stock of Bayliner Marine Corporation. The Brunswick Corporation has a number of divisions and wholly owned subsidiaries and it is the only publicly owned corporation that is in any way related to the named Bayliner respondents.

The following defendants are not parties to this action: Frank Tabone; Thomas Tabone; and Gudziks Marine, Inc.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	
A. Petitioner repeatedly mischaracterizes the nature of this case	2
B. Petitioner misrepresents the procedural history of this action	3
ARGUMENT	
I. PETITIONER'S BARE ASSERTION THAT FEDERAL MARITIME LAW DOES NOT APPLY TO THIS ACTION BECAUSE IT INVOLVES A PLEASURE BOAT ENGAGED IN NON-COMMERCIAL, NON-NAVIGATIONAL ACTIVITY IS CLEARLY ERRONEOUS AND IGNORES THIS COURT'S DECISIONS IN *FOREMOST, SISSON AND GRUBART*	6

PAGE

II. THE NEW YORK COURT OF APPEALS CORRECTLY APPLIED THE JURISDICTIONAL TEST SET FORTH IN *EXECUTIVE JET* AND REFINED BY ITS PROGENY 10

A. Situs Test 10

B. Nexus Test 11

III. THE NEW YORK COURT OF APPEALS CORRECTLY APPLIED 46 U.S.C. App. § 763a, THE UNIFORM NATIONAL LIMITATIONS PERIOD OF THREE YEARS FOR MARITIME TORTS, EXCLUSIVE OF ANY STATE STATUTES THUS RENDERING THIS ACTION TIME BARRED 13

CONCLUSION 19

TABLE OF AUTHORITIES

Cases Cited:

PAGE

Allen v. Minnstar, Inc., 8 F.3d 1470 (10th Cir. 1993).. 9

American Dredging Co. v. Miller, 510 U.S. 443 (1994) 16

Brown v. Outboard Marine Corp., 1995 A.M.C. 2792 (E.D. Mich. 1995)..... 15

Butler v. American Trawler Co. Inc., 887 F.2d 20 (1st Cir. 1989)..... 8, 15

Carey v. Bahama Cruise Lines, 864 F.2d 201 (1st Cir. 1988) 8, 13

Complaint of Bird, 794 F. Supp. 575 (D.S.C. 1992)... 11

Delta Country Ventures, Inc. v. Magana, 986 F.2d 1260 (9th Cir. 1993) 7

East River S. S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986) 9

Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972).....i, 5, 6, 10

Ford v. Atkinson Dredging Company, 222 Ga. App. 593, 474 S.E.2d 652 (Ga. Ct. App. 1996) 13, 18

Foremost Insurance Co. v. Richardson, 457 U.S. 668 (1982).....6, 7, 8, 10, 11, 12

Foster v. Peddicord, 826 F.2d 1370 (4th Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988)..... 7

Ghotra v. Bandila Shipping, Inc., 1997 A.M.C. 1936, 1940 (9th Cir. 1997) 15, 16

PAGE

H2O Houseboat Vacations, Inc. v. Hernandez, 103 F.3d 914 (9th Cir. 1996) 8

Hall v. E.I. Du Pont De Nemours & Co., 312 F. Supp. 358 (E.D.N.Y. 1970) 17

Hassinger v. Tideland Electric Membership Corp., 781 F.2d 1022 (4th Cir. 1986), *cert. denied*, *Coast Catamaran Corp. v. Hassinger*, 478 U.S. 1004 (1986) 10

Herget v. Central National Bank & Trust Co. of Peoria, 324 U.S. 4 (1945) 17

Hutt v. Gibson Fiber Glass Products, Inc., 914 F.2d 790 (6th Cir. 1990) 9

In re Dutile, 935 F.2d 61 (5th Cir. 1991) 4

In re Ludwig Mowinckles Rederi, 25 N.Y.2d 576, 307 N.Y.S.2d 660, 255 N.E.2d 74 (1970) *cert. denied*, 398 U.S. 939 (1970) 16, 17

J.J. Ryan & Sons v. Continental Insurance Co., 369 F. Supp. 692 (D.S.C. 1974) 4

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 115 S. Ct. 1043, 130 L. Ed. 2d 1024 (1995) 6, 7, 10, 11, 12, 13

Johnston v. Water Streeker Inc., et. al., No. BCV 01369 (Super. Ct., San Bernardino County, CA, filed October 10, 1996) 18

Konrad v. South Carolina Electric and Gas Co., 308 S.C. 167, 417 S.E.2d 557 (S.C. 1992) 15

Landreth v. United States, 850 F.2d 532 (9th Cir. 1988), *cert. denied*, 488 U.S. 1042 (1989) 17

PAGE

Lerner v. Karageorgis Lines, 66 N.Y.2d 479, 497 N.Y.S.2d 894, 488 N.E.2d 824 (1985) 16

Lewis v. Brunswick Corporation, 1997 A.M.C. 1921 (11th Cir. 1997) 14

Madderns v. Fox Film Corp., 205 A.D. 791, 200 N.Y.S. 344 (3d Dept 1923), *aff'd*, 237 N.Y. 614 (1924) 7

Martell v. Boardwalk Enterprises, Inc., 748 F.2d 740 (2d Cir. 1984) 9

Mink v. Genmar Industries Inc., 29 F.3d 1543 (11th Cir. 1994) 15

Moore v. Brunswick Corporation, 889 S.W.2d 246 (Tex. 1994), *cert. denied, Vivian Industrial Plastics, Inc. v. Moore*, 513 U.S. 1057 (1994).... 9

Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) 15

Pope & Talbot v. Hawn, 346 U.S. 406 (1953) 15

Price v. Price, 929 F.2d 131 (4th Cir. 1991).....10, 13

Scheidewind v. ANR Pipeline, 485 U.S. 293 (1988) ... 14

Seymour v. Brunswick Bowling & Billards Corp., 655 So. 2d 892 (Miss. 1995) 9

Sgambati v. United States, 172 F.2d 297 (2d Cir. 1949), *cert. denied*, 337 U.S. 938 (1949) 17

Sisson v. Ruby, 497 U.S. 358 (1990).....6, 7, 8, 10, 11, 12

Smith v. H.B. Allsup & Sons Inc., 718 F. Supp. 21 (S.D. Miss. 1989) 17

Smith v. Knowles, 642 F. Supp. 1137 (D. Md. 1986) .. 7

PAGE

Stanley v. Bertram-Trojan, Inc., 855 F. Supp. 657 (S.D.N.Y. 1994) 9

Walsh v. Seagull Energy Corp., 836 F. Supp. 411 (S.D. Tex. 1993) 4

White v. United States, 53 F.3d 43 (4th Cir. 1995) 8

Woltering v. Outboard Marine Corp., 615 N.E.2d 86 (Ill. App. Ct. 1993), *cert. denied*, 513 U.S. 1198 (1995) 9

Yamaha Motor Corp., U.S.A. v. Calhoun, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996) 16

Statutes Cited:

N.Y. C.P.L.R. § 205 3

N.Y. C.P.L.R. § 208 ..... 14, 18

N.Y. C.P.L.R. § 214 ..... 14, 18

N.Y. C.P.L.R. § 306-b 3

N.Y. C.P.L.R. § 306-b(b) 3

28 U.S.C. § 1332 4

28 U.S.C. § 1333 ..... 4, 14, 16

28 U.S.C. § 1441 4

46 U.S.C. § 183b (c) 17

46 U.S.C. § 763 17

46 U.S.C. App. § 763a ..... i, 2, 4, 5, 13, 14, 15, 16, 17, 18

PAGE

Other Authorities Cited:

Bender's Recreational Boating Law § 1.03[C] (C. Peter Theut ed. 1994) 7

H.R. Rep. No. 737, 96th Cong., 2d Sess. 1-2, reprinted in 1980 U.S. Code Cong. & Admin. News 3303 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-2023

EILEEN O'HARA,

Petitioner,

—against—

BAYLINER; BAYLINER MARINE CORPORATION d/b/a BAYLINER; BAYLINER MARINE CORPORATION; U.S. MARINE; U.S. MARINE CORPORATION d/b/a U.S. MARINE; U.S. MARINE CORPORATION; PERKO, INC.; PERKO MANUFACTURING CORP.; PERKINS MARINE LAMP & HARDWARE CORP.; BRUNSWICK MARINE COMPANY; FRANK TABONE; THOMAS TABONE; GUDZIKS MARINE, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

RESPONDENTS' BAYLINER BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the New York State Court of Appeals is reported at 89 N.Y.2d 636, 679 N.E.2d 1049, 657 N.Y.S.2d 569 (1997).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

46 U.S.C. App. § 763a:

§ 763a. Limitations

> Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued.

STATEMENT OF THE CASE

Petitioner was allegedly injured on August 12, 1990 while disembarking from a boat anchored in the waters of Huntington Bay, a navigable water of the United States. Petitioner alleges that while disembarking from this vessel, she was injured by a cleat affixed to the vessel.

A. Petitioner repeatedly mischaracterizes the nature of this case

Petitioner attempts to recharacterize this maritime products liability action as a "typical State law slip and fall personal injury case". (Pet. 9) Petitioner filed suit against respondents, Bayliner, Bayliner Marine Corporation d/b/a Bayliner, Bayliner Marine Corporation, U.S. Marine, U.S. Marine Corporation d/b/a U.S. Marine, U.S. Marine Corporation, and Brunswick Marine Company[1] (hereinafter collectively referred to as "Bayliner") alleging that a cleat which was

---

[1] Only two of the above named respondents are corporate entities: Bayliner Marine Corporation and U.S. Marine Corporation. The other above named respondents are either trade names or divisions without separate legal existence. Of the two properly named corporate entities, only Bayliner Marine Corporation actively conducts business; U.S. Marine Corporation is dormant and does not engage in any business activities.

affixed to the vessel was improperly designed and positioned and that the vessel was defectively manufactured because it was not equipped with nonskid material and a handrail. (App. 1a).

Moreover, petitioner's attempt to trivialize the maritime nature of this action by repeatedly referring to the alleged incident as a "slip and fall" conveniently ignores the plain language of the complaint. (Pet. *i*, 7, 9, 12, 13,) In paragraph 2 of its complaint, petitioner alleged that the vessel operator "anchored the Bayliner boat offshore in Huntington Bay for the purposes of disembarking" and that "[petitioner], in disembarking, was severely injured. . .". Notably, petitioner fails to give any reasons for the alleged "slip and fall".

B. Petitioner misrepresents the procedural history of this action

Petitioner discusses the procedural path of this action in exhaustive detail, including her first invalid attempt at commencing suit in Supreme Court of the State of New York, County of New York (hereinafter Supreme Court, New York County) which was a nullity. Petitioner fails to mention that she had three opportunities to timely commence an action and failed to do so. First, the initial action was automatically dismissed by operation of law when petitioner failed to comply with N.Y. C.P.L.R. § 306-b by filing proof of service within 120 days of filing the summons and complaint. Second, petitioner failed to take advantage of the extension provisions of N.Y. C.P.L.R. § 306-b(b), which allow commencement of a new action after the statute of limitations has expired. Furthermore, petitioner failed to invoke N.Y. C.P.L.R. § 205 which would have allowed her to commence an action within six months of the automatic dismissal.

This action was commenced on August 8, 1994, almost four years after the date of incident. (App. 19a) On September 9, 1994 Bayliner filed notice of removal to United States

District Court for Southern District of New York pursuant to 28 U.S.C. § 1441. (App. 16a) Removal was based on diversity jurisdiction pursuant to 28 U.S.C. § 1332.[2] Thereafter, petitioner moved to remand the action and amend the complaint to add non-diverse parties.(App. 16a) The District Court found petitioner's motion to remand to be "without merit". However, the court allowed petitioner to amend the complaint to add non-diverse parties. As a result of the amendment, diversity was destroyed and action was remanded to Supreme Court, New York County[3] (App. 16a).

In response to petitioner's Amended Complaint, Bayliner moved to dismiss petitioner's action on the ground that petitioner's claims were governed by federal maritime law and were thus time-barred pursuant to the applicable three year statute of limitations period prescribed in 46 U.S.C. App. § 763a. (App. 1a, 13a).

By Decision and Order entered May 3, 1995, Supreme Court, New York County (Justice Goodman) determined that federal maritime law did not govern the action. As stated

---

[2] As decided below, this case falls within the federal court's admiralty jurisdiction pursuant to 28 U.S.C. §1333 and is governed by federal maritime law. The removal jurisdiction of the federal courts pursuant to 28 U.S.C. §1441 cannot be based solely on admiralty jurisdiction or the application of federal maritime law to the action. *See, e.g. Walsh v. Seagull Energy Corp.*, 836 F. Supp. 411 (S.D. Tex. 1993).

[3] The district court's removal jurisdiction could not be maintained solely because federal maritime law governs the case. *See, e.g., In re Dutile*, 935 F.2d 61 (5th Cir. 1991); *J.J. Ryan & Sons v. Continental Ins. Co.*, 369 F. Supp. 692 (D.S.C. 1974). Once diversity was destroyed, the District Court lacked jurisdiction to do anything other than remand the case to Supreme Court, New York County. U.S. District Judge Wood never addressed the merits of Bayliner's defense that the three year statute of limitations prescribed in 46 U.S.C. App. § 763a bars the action. In fact, Justice Goodman of Supreme Court, New York County stated in her May 3, 1995 order that the case was remanded to her court due to the addition of non-diverse plaintiffs. (App. 16a).

by the New York State Court of Appeals (Associate Judge Bellacosa):

> [T]he New York State Supreme Court applied an overly narrow test for resolving the threshold question. It reasoned that '[petitioner] was injured on a pleasure boat, that is a craft having no relationship to the traditional and most significant concern of admiralty jurisdiction-the protection of those engaged in commerce'. Additionally, the nisi prius court noted that 'while Huntington Bay may constitute navigable waters, the boat was at rest very close to the shore, and the individuals on board were using it for purely recreational purposes.'

(App. 2a).

On February 26, 1996 the Supreme Court of New York, Appellate Division, First Department affirmed the lower court's order without opinion. Associate Justice Wallach filed a separate opinion wherein he urged the application of federal maritime law to the within action. (App. 13a).

On March 25, 1997, the New York State Court of Appeals (hereinafter Court of Appeals) unanimously reversed the lower courts and granted Bayliner's motion to dismiss the complaint, as barred by 46 U.S.C. App. § 763a. In so deciding, the Court of Appeals reviewed this Court's "precedents and principles" and applied the jurisdictional test set forth in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972) and modified by its progeny. (App. 2a) The court held that the "plain reading and application of these. . . . precedents leads to the inescapable conclusion that Federal admiralty jurisdiction governs the instant controversy." (App. 6a).

ARGUMENT

I.

PETITIONER'S BARE ASSERTION THAT FEDERAL MARITIME LAW DOES NOT APPLY TO THIS ACTION BECAUSE IT INVOLVES A PLEASURE BOAT ENGAGED IN NON-COMMERCIAL, NON-NAVIGATIONAL ACTIVITY IS CLEARLY ERRONEOUS AND IGNORES THIS COURT'S DECISIONS IN *FOREMOST, SISSON AND GRUBART*

Petitioner's claim that applying federal maritime law to this action involving a pleasure boat in non-commercial, non-navigational activity extends the reach of *Executive Jet* ignores this Court's subsequent decisions in *Foremost Insurance Co. v. Richardson,* 457 U.S. 668 (1982), *Sisson v. Ruby,* 497 U.S. 358 (1990) and *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S. Ct. 1043, 130 L. Ed. 2d 1024 (1995) which refined the jurisdictional test.

In *Foremost*, a case involving a collision between two pleasure crafts, this Court held that admiralty law should be applied to commercial and noncommercial vessels alike:

> The federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually *engaged* in commercial maritime activity. This interest can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct.

457 U.S. 674-675. Petitioner conveniently overlooks this language in erroneously stating that the "need for uniformity is not of preeminent importance, particularly with respect to aquatic recreational activities or other non-maritime commerce activity". (Pet. 10).

Moreover, in *Sisson*, this Court foreclosed the view that *Foremost* was intended to limit federal maritime jurisdiction in pleasure craft cases to only those involving navigation of vessels. *Bender's Recreational Boating Law* § 1.03[C] (C. Peter Theut ed. 1994) This Court upheld admiralty jurisdiction when a fire erupted on a pleasure boat due to a defective washer/dryer unit on board the yacht while it was docked at a marina. Therefore, petitioner's statement that "[a] case that involves a recreational boat is likely not within admiralty unless navigational activity and/or maritime commerce is involved" (Pet. 8) is without merit and stands in stark contrast to *Sisson v. Ruby*.

This Court's latest pronouncement regarding admiralty jurisdiction in *Grubart* stressed that overgeneralizing the alleged tort to eliminate a maritime connection would be a mistake and would "convert *Sisson* into a vehicle for eliminating admiralty jurisdiction". 115 S. Ct. at 1052, 130 L. Ed. 2d at 1040. This Court stated that "although . . . [*Foremost and Sisson*] do not say that every tort involving a vessel on navigable waters falls within the scope of admiralty jurisdiction no matter what, they do show that ordinarily that will be so". *Grubart*, 115 S. Ct. at 1053, 130 L. Ed. 2d at 1041.

In erroneosly asserting that federal maritime law does not apply to this action, petitioner relies upon the following distinguishable cases: *Foster v. Peddicord*, 826 F.2d 1370 (4th Cir. 1987) *cert. denied* 484 U.S. 1027 (1988) (pleasure boat passenger injured in diving accident); *Delta Country Ventures, Inc. v. Magana*, 986 F.2d 1260 (9th Cir. 1993) (houseboat guest injured when dove off boat and struck object under water); *Smith v. Knowles*, 642 F. Supp. 1137 (D. Md. 1986) (pleasure boat passenger jumped overboard to urinate); *Madderns v. Fox Film Corp.*, 205 A.D. 791, 200 N.Y.S. 344 (3d Dep't 1923), *aff'd* 237 N.Y. 614 (1924) (motion picture actor being chased along edge of boat, tripped and fell into water).

The Court of Appeals was not persuaded by petitioner's attempts to mischaracterize the nature of this action as a swimming or diving accident or as a slip and fall. It was similarly unpersuaded by petitioner's erroneous assertions that this case does not involve any maritime concerns. Instead, the Court of Appeals held this incident was substantially related to traditional maritime activity because it involved the operation of a vessel on navigable waters. (App. 8a) Moreover, the plain language of the complaint asserts that petitioner was injured while disembarking from the vessel, also traditional maritime activity. *White v. United States*, 53 F.3d 43 (4th Cir. 1995); *Carey v. Bahama Cruise Lines*, 864 F.2d 201 (1st Cir. 1988). *See also Butler v. American Trawler Co. Inc.*, 887 F.2d 20, 21 (1st Cir. 1989) ("[T]he boarding of a ship bears a significant relation to traditional maritime activities . . . one does not normally board a ship in quite the same way one enters a building, an airplane or a car.") Finally, petitioner surprisingly fails to mention that she was injured on a cleat, a unique and traditional piece of marine hardware.

Petitioner's assertion that "the cases involving navigating vessels and maritime commerce cited to by the Court of Appeals and by [Bayliner] are not applicable to the case at bar" strains credulity. (Pet. 9) According to petitioner's reasoning, this Court erroneously cited to *Foremost* in deciding *Sisson*.

The petition claims as a general matter that federal maritime law does not apply to product liability claims "involving boats on navigable waters not engaged in maritime commerce or navigation". (Pet. 8) The cases cited by petitioner in reliance upon this erroneous proposition are easily distinguishable from the case at bar. *H2O Houseboat Vacations, Inc. v. Hernandez*, 103 F.3d 914 (9th Cir. 1996) (nexus test not met when passengers of houseboat tied to shore of a lake injured by emission of carbon monoxide fumes inside sleeping area, no potential to disrupt maritime commerce

because fumes would not be dangerous if they escaped); *Allen v. Minnstar, Inc.*, 8 F.3d 1470 (10th Cir. 1993) (admiralty jurisdiction not discussed, passenger fell overboard); *Hutt v. Gibson Fiber Glass Products, Inc.*, 914 F.2d 790 (6th Cir. 1990) (admiralty jurisdiction not discussed, decedent electrocuted while swimming near houseboat); *Martell v. Boardwalk Enterprises, Inc.*, 748 F.2d 740 (2d Cir. 1984) (admiralty jurisdiction not discussed, incident occurred on non-navigable waters of Lake George, New York); *Stanley v. Bertram-Trojan, Inc.*, 855 F. Supp. 657 (S.D.N.Y. 1994) (admiralty jurisdiction not discussed, sole issue in case deals with Federal Boat Safety Act); *Seymour v. Brunswick Bowling & Billards Corp.*, 655 So.2d 892 (Miss. 1995) (admiralty jurisdiction not discussed, involved accident on lake); *Moore v. Brunswick Corporation*, 889 S.W. 2d 246 (Tex. 1994), *cert. denied, Vivian Indus. Plastics, Inc. v. Moore*, 513 U.S. 1057 (1994) (admiralty jurisdiction not discussed, sole issue in case deals with Federal Boat Safety Act); *Woltering v. Outboard Marine Corp.*, 615 N.E.2d 86 (Ill. App. Ct. 1993) *cert. denied*, 513 U.S. 1198 (1995) (nexus test not met when pleasure boat passenger thrown overboard and injured by propeller).

Notably, petitioner fails to mention *East River S. S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), wherein this Court unanimously held that a products liability action which meets the jurisdictional test is governed by federal maritime law. As set forth in Point II, *infra*, this case meets the two pronged jurisdictional test and therefore warrants application of admiralty law.

II.

THE NEW YORK COURT OF APPEALS CORRECTLY APPLIED THE JURISDICTIONAL TEST SET FORTH IN *EXECUTIVE JET* AND REFINED BY ITS PROGENY

Petitioner's assertion that the Court of Appeals decision "vitiates [this Court's] precedents and principles with respect to federal maritime law" and retreats to the historical bright line strict locality rule is patently erroneous. (Pet. 6) The Court of Appeals decision was a correct application of the seminal cases decided by this Court which set forth the two pronged test for admiralty jurisdiction.

A. Situs Test

It is not disputed that Huntington Bay is a navigable water of the United States and satisfies the situs test or first prong of the jurisdictional analysis under *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), *Sisson v. Ruby*, 497 U.S. 358 (1990), and *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S. Ct. 1043, 130 L. Ed. 2d 1024 (1995). Petitioner unavailingly attempts to cast doubt upon the holding by repeatedly stressing that the vessel was located in shallow navigable waters fifteen feet from the beach. (Pet. 2,7,9) It is well settled that maritime jurisdiction encompasses all waters within the ebb and flow of the tide, *Hassinger v. Tideland Elec. Membership Corp.*, 781 F.2d 1022 (4th Cir. 1986), *cert. denied Coast Catamaran Corp. v. Hassinger*, 478 U.S. 1004 (1986) and that depth of the water is irrelevant to the analysis. *See e.g., Price v. Price*, 929 F.2d 131 (4th Cir. 1991) (situs test met where accident occurred when boat was being beached).

B. Nexus Test

The first inquiry of the two-step nexus test requires an assessment of the general features of the alleged incident and a determination whether it had potential to disrupt maritime commerce. *Sisson*, 497 U.S. at 363, *Grubart*, 115 S. Ct. at 1043, 130 L. Ed. 2d at 1038. The Court of Appeals examined the general features of this incident, placing a defective vessel in navigable water, and stated that it could create "a hazardous situation to nearby vessels and all those engaged in maritime activity". (App. 7a). Contrary to petitioner's assertion no court has characterized the general feature of this incident as "protecting sailors engaged in maritime activity from defective equipment". (Pet. 11) Moreover, the Court of Appeals noted "the existence of a dangerous and, possibly, injurious situations 'could lead to restrictions on the navigational use of the waterway'. " (App. 7a) *quoting Grubart*, 115 S. Ct. at 1050-1051. 130 L. Ed. 2d at 1038. The court stated "potentiality is plainly operative under the facts of this case" and held that "this case qualifies as potentially disruptive of maritime commerce". (App 7a, 8a).

Petitioner asks this court to modify the potentiality aspect of this inquiry and focus on the incident "[a]s it actually happened".(Pet. 12) The petition criticizes *Complaint of Bird*, 794 F. Supp. 575, 579 (D.S.C. 1992), wherein the court examined the general features of the alleged accident not in the shallow water where it occurred, but in a busy maritime thoroughfare. Petitioner glaringly omits to mention that *Complaint of Bird* relied in part on *Foremost* wherein two pleasure boats collided in an area which was "seldom, if ever used for commercial traffic", 457 U.S. at 670, n. 2., and this Court examined the potential impact on maritime commerce as if the collision occurred at the mouth of the St. Lawrence Seaway. 457 U.S. at 675.

Petitioner's incident occurred on the navigable waters of Huntington Bay which flows into Long Island Sound, a body

of water which borders the States of New York and Connecticut and which flows into the Atlantic Ocean at its eastern terminus. In this case, if emergency personnel, Suffolk County marine police, Coast Guard and other rescuers had been called to the scene, undoubtedly it could have impacted maritime commerce. Indeed, had the accident occurred at the entrance to Huntington Bay, rescue efforts could have blocked the use of the channel for the numerous vessels (both commercial and pleasure) which ply Huntington Bay. Had the accident occurred at Town Dock, rescue efforts could have interfered with the other vessel traffic in the area.

Certainly, the Court of Appeals holding that placing a defectively designed vessel in the navigable waters of the United States has the potential to disrupt maritime commerce fits squarely within the parameters set forth in *Sisson* and *Grubart* and cannot be disputed.

The second prong of the nexus test requires a court to determine if the "general conduct from which the incident arose" bears a substantial relationship to traditional maritime activity. *Sisson*, 497 U.S. at 364. Petitioner however, attempts to redefine this second step as requiring a "sufficient connection to maritime commerce" to suit her own purposes. (Pet. 12) The maritime connection is much broader than petitioner asserts, "there is no requirement that 'the maritime activity be an exclusively commercial one' " *Foremost,* 457 U.S. 674 *quoting Richardson v. Foremost Insurance Co,* 641 F.2d 314, 316 (5th Cir. 1981). A court must ask "whether a tortfeasor's activity, commercial or noncommercial, on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the case.." *Grubart*, 115 S. Ct. at 1051, 130 L. Ed. 2d at 1038. Activities such as the navigation of a vessel in navigable waters, *Foremost*, 457 U.S. at 674, the "storage and maintenance of a boat at a marina on navigable waters", *Sisson*, 497 U.S. at 365, and "repair or maintenance work on a navigable waterway performed from

a vessel", *Grubart*, 115 S. Ct. at 1051, 130 L. Ed. 2d at 1039, satisfy the substantial connection test.

The Court of Appeals holding that this incident which involved the "operation of boats in navigable water" (App. 8a) satisfies the substantial connection test is in accord with the well established law promulgated by this Court. *See also Carey v. Bahama Cruise Lines*, 864 F.2d 201, 207 n.4 (1st Cir. 1988) (injury incurred while disembarking from a cruise ship possessed the requisite nexus to traditional maritime activity); *Price v. Price*, 929 F.2d 131 (4th Cir. 1991) (passenger on pleasure boat injured while operator attempted to beach the vessel to disembark passengers satisfied the substantial relationship to traditional maritime activity inquiry).

III.

THE NEW YORK COURT OF APPEALS CORRECTLY APPLIED 46 U.S.C. App. § 763a, THE UNIFORM NATIONAL LIMITATIONS PERIOD OF THREE YEARS FOR MARITIME TORTS, EXCLUSIVE OF ANY STATE STATUTES THUS RENDERING THIS ACTION TIME BARRED

Congress expressly enacted 46 U.S.C. App. § 763a to create a "uniform national statute of limitations for maritime torts". *See* H.R. Rep. No. 737, 96th Cong., 2d Sess. 1-2, reprinted in 1980 U.S. Code Cong. & Admin. News 3303. The legislative history reveals that Congress "sought to eliminate forum shopping and the presentation of stale claims which can result when claimants seek to bring their suit in the jurisdiction having the most advantageous procedural rules." *Ford v. Atkinson Dredging Company*, 222 Ga. App. 593, 474 S.E.2d 652 (Ga. Ct. App. 1996) (*citations omitted)*. Therefore, 46 U.S.C.App. § 763a ensures that maritime tort cases will receive uniform treatment whether brought in federal or state

court pursuant to the "saving to suitors" clause of 28 U.S.C. § 1333.[4]

Petitioner mistakenly relies on the prefatory language of 46 U.S.C. App. § 763a, "[u]nless otherwise specified by law" in stating that the New York statute of limitations contained in N.Y. C.P.L.R. § 214 and the New York infancy tolling provision contained in N.Y. C.P.L.R. § 208 apply to this action. This argument disregards the Supremacy Clause of the United States Constitution pursuant to which federal law preempts state law in three situations, two of which exist in this case: 1) Express Preemption- when Congress expressly states the extent to which federal law preempts state law and 2) Implied Conflict Preemption- when federal and state law directly conflict and it is impossible to comply with both provisions. *See generally, Scheidewind v. ANR Pipeline*, 485 U.S. 293, 299-300 (1988). *See also Lewis v. Brunswick Corporation*, 1997 A.M.C. 1921 (11th Cir. 1997) A state law is impliedly preempted when it "conflicts with the 'accomplishment and execution of the full purposes and objectives of Congress' ". *Lewis*, 1997 A.M.C. at 1929 *quoting Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995). As set forth above, the express purpose of enacting § 763a was to provide for a uniform national statute of limitations for maritime tort actions. Allowing litigants to avail themselves of a particular state's limitation period by shopping for a "friendly" state court instead of federal court would frustrate Congress' intent to preclude forum shopping and promote uniformity. Furthermore, the application of any state statute of limitation directly conflicts with § 763a because compliance with two limitations periods is impossible. Therefore, § 763a preempts the New York State statute of limitations period.

---

[4] Petitioner's unsupported assertion that § 763a was not meant to apply to state law claims is absolutely without merit and completely disregards the "saving to suitors" clause contained in 28 U.S.C. § 1333.

Petitioner's argument that there is a presumption against preemption by federal maritime law is a red herring. This Court has clearly pronounced that a maritime tort is a "type of action which the Constitution has placed under national power to control in 'its substantive as well as procedural features' ". *Pope & Talbot v. Hawn*, 346 U.S. 406, 409 (1953) *quoting Panama R. Co. v. Johnson*, 264 U.S. 375, 386 (1924).

Petitioner's argument that this Court should not apply § 763a because the annotations to the statute do not contain a case identical to this case is frivolous. Annotations are merely a sample of cases and not an exhaustive list of cases which deal with a particular statute. The assertion also stands in stark contrast to federal and state court opinions which have determined that Congress intended § 763a to preclude the application of state statute of limitations with respect to maritime tort actions brought by pleasure craft passengers. *See Mink v. Genmar Industries Inc.*, 29 F.3d 1543 (11th Cir. 1994) (action by pleasure craft passenger brought almost four years after the date of the accident held time barred by § 763a); *Konrad v. South Carolina Elec. and Gas Co.*, 308 S.C. 167, 417 S.E.2d 557 (S.C. 1992) (personal injury action brought by sailboat passenger governed by § 763a, thereby barring action brought nearly six years after date of incident); *See also Butler v. American Trawler Co. Inc.*, 887 F.2d 20 (1st Cir. 1989) (personal injury action brought by passenger three and one-half years after the date of accident subject to § 763a and time barred); *Brown v. Outboard Marine Corp.*, 1995 A.M.C. 2792 (E.D. Mich. 1995) (action by minor injured while trying to board pleasure craft after "tubing" held subject to admiralty jurisdiction and time barred pursuant to § 763a because action was commenced after expiration of three year limitation period).

Alternatively, the "reverse-*Erie*" doctrine mandates that § 763a be applied in maritime tort cases pending in state courts. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 223 (1986). *See also Ghotra v. Bandila Shipping, Inc.*, 1997

A.M.C. 1936, 1940 (9th Cir. 1997) Pursuant to the "Savings to Suitors" clause of 28 U.S.C. § 1333, both federal and state courts have concurrent original jurisdiction over admiralty and maritime cases. *American Dredging Co. v. Miller* 510 U.S. 443 (1994). However, state courts in maritime cases must apply federal law "to secure a single and uniform body of maritime law". *Lerner v. Karageorgis Lines*, 66 N.Y.2d 479, 484-485, 497 N.Y.S.2d 894, 895, 488 N.E.2d 824 (1985) *quoting In re J. Ludwig Mowinckles Rederi.*, 25 N.Y.2d 576, 581, 307 N.Y.S. 2d 660, 663, 255 N.E.2d 74 (1970) *cert. denied* 398 U.S. 939 (1970). A state court may not apply any state remedy which "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations". *American Dredging*, 510 U.S. at 447 *quoting Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917). Therefore, a state court may not limit a party's substantive rights nor apply its own procedural rules if they would "significantly affect the result of the litigation, i.e., would be outcome determinative". *In re Rederi*, 307 N.Y.S.2d at 663. Accordingly, the federal statute of limitations contained in § 763a applies to a maritime tort case pending in state court.

The circumstances in which state law may supplement federal maritime law are very limited. In this Court's most recent pronouncement, *Yamaha Motor Corp., U.S.A. v. Calhoun*, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996), a state wrongful death statute supplied a remedy not recognized under the general maritime law. However, in explaining the difference between the extent to which general maritime law and federal statutes may be supplemented by state law, this Court stated "when Congress has prescribed a comprehensive tort recovery regime to be uniformly applied, there is . . . no cause for enlargement of the damages statutorily provided." 116 S. Ct. at 631, 133 L. Ed. 2d at 591-592. Congress enacted 46 U.S.C.App. § 763a to govern all maritime torts and did not provide for supplementation by state law.

The provisions of 46 U.S.C. App. § 763a contain no exceptions or tolling provisions. Had Congress intended to provide a tolling provision, it could have enacted one. *See, e.g.*, 46 U.S.C. § 183b (c); 46 U.S.C. § 763 (the predecessor statute to 46 U.S.C. App. § 763a). Where Congress creates a limitation period without a tolling provision, the limitation period is conclusive. *See, e.g., Herget v. Central Nat. Bank & Trust Co. of Peoria,* 324 U.S. 4, 7-8 (1945) (refusing to extend a limitation period of the Bankruptcy Act).

The application of the New York tolling provision would directly affect the outcome of this case by extending the time for plaintiff to commence suit. This result would undermine the explicit Congressional intent in enacting 46 U.S.C. App. § 763a, i.e., the establishment of a uniform limitations period for all maritime tort actions seeking recovery for personal injury. *See Landreth v. United States,* 850 F.2d 532 (9th Cir. 1988), *cert. denied*, 488 U.S. 1042 (1989) (state infancy tolling provisions could not be invoked to extend plaintiff's time to sue under Federal Tort Claim Act); *Smith v. H.B. Allsup & Sons Inc.*, 718 F. Supp. 21, 22 (S.D. Miss. 1989) (state infancy tolling provisions could not extend plaintiff's time to sue under Fair Labor Standards Act); *Hall v. E.I. Du Pont De Nemours & Co.*, 312 F. Supp. 358, 360-361 (E.D.N.Y. 1970) (collecting cases in support of holding that court could not create an infancy toll for personal injury governed by statute of limitations contained in Clayton Act); *Sgambati v. United States,* 172 F.2d 297 (2d Cir. 1949), *cert. denied*, 337 U.S. 938 (1949) (time to commence action under Suits in Admiralty Act and Public Vessels Act not extended by plaintiff's infancy). The conspicuous absence of a tolling provision in 46 U.S.C. App. § 763a makes plaintiff's age at the accrual date irrelevant to the determination that the action is time-barred.

Moreover, as set forth above, a state court cannot apply its own procedural rules if such rules would determine the outcome of the litigation. *In re Redieri,* 307 N.Y.S.2d at 663. In

this case, applying N.Y. C.P.L.R. § 208 would save an otherwise untimely action.

State courts have pronounced that their respective state tolling provisions cannot supplement § 763a to salvage a maritime tort action brought by a minor more than three years after the date of incident. In *Ford v. Atkinson Dredging Co.*, 222 Ga. App. 593, 474 S.E.2d 652 (Ga. Ct. App. 1996), minor plaintiff was injured when pleasure boat on which she was a passenger collided with barge. Plaintiff instituted suit more than three years after the incident. The court rejected plaintiff's argument that her minority tolled the statute of limitations. The court held the Georgia infancy tolling statute inapplicable because the claim arose under general maritime law, 46 U.S.C. App. § 763a. *See also, Johnston v. Water Streeker Inc., et. al.*, No. BCV 01369 (Super. Ct., San Bernardino County, CA, filed October 10, 1996) (maritime tort case instituted more than three years after date of alleged incident, court held "[A]lthough plaintiff was a minor at the time of the accident, section 763a provides no tolling provision to account for his minority. Consequently, his action is time-barred").

Thus, the Court of Appeals was correct in applying 46 U.S.C. App. § 763a to the exclusion of N.Y. C.P.L.R. § 208 and § 214 and petitioner's action is time barred.

CONCLUSION

For the reasons stated above, it is respectfully submitted that petition for a writ of certiorari should be denied.

Dated: New York, New York
July 23, 1997

Respectfully submitted,

JOHN G. INGRAM*
JULIE PATEMAN WARD
HEALY & BAILLIE, LLP
29 Broadway
New York, New York 10006
(212) 943-3980

Attorneys for Respondents Bayliner; Bayliner Marine Corporation d/b/a Bayliner; Bayliner Marine Corporation; U.S. Marine; U.S. Marine Corporation d/b/a U.S. Marine; U.S. Marine Corporation; Brunswick Marine Company

**Counsel of Record*